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CASE NO. 14036.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN CADWALADER, COLLECTOR OF the port of Philadelphia, plaintiff in error,
v.
JOHN E. F. ZEH ET AL.
No. 106.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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This was an action to recover duties paid under protest upon certain articles of earthenware claimed by the importers to be toys. The importations were made in 1887 and 1888, so that the case is governed by the tariff law of 1883. The court (Judge Butler) left the case to the jury, which found a verdict for the importers. The collector assigns error in the charge and in exclusion of evidence.

STATEMENT OF THE CASE.

The articles in question were assessed by the collector as earthenware at 60 per cent. The importers claimed that they should have been classified as toys at 35 per cent, and sued to recover the difference between these amounts (p. 119).

The articles in question are not anywhere systematically described. Their nature, however, appears clearly from the testimony. They consisted of earthenware cups, saucers, plates, and mugs, ornamented with letters and pictures for the instruction and entertainment of children. They were larger than the similar articles universally recognized by the community as toys—were large enough to be actually used by children for eating and drinking, and were admittedly so used to a certain extent. Whether such use was the chief use of the articles was one of the points upon which the evidence conflicted. The plates were 5 or 6 inches in diameter.

Plaintiff's witnesses were importers and jobbers in toys and crockery and glassware. They all testified that the articles in question were known to the trade as toys, and were specifically called toy plates, toy muffins, toy teas, etc. One of plaintiff's witnesses stated that the articles were not made in this country (p. 22), and none of them seem to recognize any articles of the size of those in question as made in this country under the name of toys.

The collector's witnesses were mainly manufacturers of earthenware from Trenton, N. J., the headquarters of that industry (pp. 55, 70, 77, 82, 92, 97, 100, 101, 103, 106, 108). They recognized certain articles as toy cans (pp. 49, 61,

76), but denied the name of toys to the rest of the articles, giving them such trade appellations as A B C plates (pp. 57, 70, 83, 93, 104); A B C muffins (p. 75); motto muffins (p. 75); alphabet plates (p. 55); 36's mugs (p. 70); 42's mugs (pp. 78, 93, 98); luster mugs (p. 76); ovide teas (p. 77); Norfolk teas (pp. 49, 106, 109); Tom and Jerrys (pp. 83, 98, 101); child's sets (p. 66); printed earthenware (pp. 57, 70); or plain cups, saucers, plates, and mugs (pp. 55, 66, 77).

The Government produced samples of very small cups saucers, etc., such as are in familiar use by small children, which the collector's witnesses recognized as toys in the meaning of trade. In examining the evidence care must be taken to distinguish between these samples and the importers' samples, both being frequently exhibited to the witnesses and commented upon through the entire trial.

Vain attempts were made by the District Attorney to ascertain the precise limits of the trade usage alleged by the importers' witnesses. They contradicted each other hopelessly as to the test.

Anton Winters, importer of toys and fancy goods:

> Q. Is that a toy plate?
> A. That I would consider a toy plate with it.
> Q. Is or is not the question of whether a thing is a toy in the trade dependent on its size?
> A. No, sir; it has nothing to do with it.
> * * * * *
> Q. Is there any ware for the manufacture of toys that is known as toy ware?
> A. I never order them that way.

Q. Does this substance out of which they are made differ from the substance out of which other plates and saucers and cups are made?

A. No (p. 19).

Albert A. Bockius, importer of china and glassware:

Q. How soon does it cease to be a toy, or how do you distinguish one from the other; when does the ware cease to be a toy? What is the difference between a toy of that kind and ware of that description that is not a toy?

A. The difference in size.

* * * * *

Q. What is it that makes a cup and saucer of that size, which is no larger than a size which is used by an adult, a toy?

A. The only reason I know is that they are made for toy teas.

Q. Made by whom?

A. Made by the manufacturer.

Q. Is there such a thing known to the trade as toy ware?

A. Not as a ware. The toy is the use for which they are made and to which they are put. (P. 22.)

Albert E. Snow, importer of china and earthenware:

Q. Can you give us any distinguishing characteristics of this class as a whole between classes of goods that are intended for practical use? I would not know, perhaps, how to know toy ware from other ware. I want to know what are some of the distinguishing characteristics of it.

A. The general quality of the goods. We use a great many of these earthen goods and cheaper goods as toy ware. They are used and imported and handled principally as toys.

* * * * *

Q. Do you know whether there is an article used in the earthenware trade that is known as toy ware, that is, different from this article here?

A. There are articles made in this country which are classed under toy ware the same as other articles would be classed as tea ware or dinner ware, but they are made * * * out of similar material. (P. 25.)

Q. Is there any composition known as toy ware?

A. Not to my knowledge.

Q. If this decoration were taken off, would it still be toy ware? (Sample shown witness.)

A. Yes, sir.

Q. Perfectly white?

A. Yes, sir. (P. 27.)

Thomas C. Atherholt, importer of china, glass, and queensware:

Q. Have you not a ware that is called toy ware?

A. No. Nothing that the material out of which it is made is called toy material, or material to make toy ware of. I have never heard of that.

Q. So that the quality of these goods, their workmanship, does not give that distinctive name in trade at all; is that it?

A. I do not understand you.

Q. I presume there is a certain kind of workmanship which gives the name of crockeryware and stoneware; is there not?

A. I do not know that the workmanship gives it.

Q. What is it that makes it?

A. It is the size, I should say. (P. 33.)

George L. Dych, importer of china, glass, and queensware:

Q. This is a plaything and can only be used by children as an article of household use?

A. Yes, sir; the A, B, C, on it——

Q. Having this on it makes it a useful article?
A. Having that makes it a toy, I say. (P. 38.)

John E. Frymier, importer and dealer in china and crockery:

Q. Toy relates to size?
A. Yes, sir.
Q. That is, a small-size article of earthenware?
A. Yes, sir.
Q. It has nothing to do with the use?
A. No, sir.

* * * * *

Q. Is it size alone that determines the question as to whether the thing is known in the trade as a toy?
A. No, sir; there is a certain line of goods in the trade that are known as toys, and known as such, and bought and sold as such. Those goods you show here come under that head in the trade. (P. 39.)

The difference between the imported goods referred to by the importers' witnesses and the American goods referred to by the collector's witnesses was in the decorations, not in the size, shape or character of ware (p. 56). The District Attorney's theory was that in this state of the evidence the jury was bound to fall back on the common meaning of the word toy. The court, however, charged the jury that there was without doubt "a well-understood trade signification;" that the witnesses "differ only as respects the scope of its application," and left to them the question, "What was its scope at the date of the statute?" (pp. 119, 120.)

At the commencement of the trial the court admitted, over the District Attorney's objection, a number of printed

price lists furnished by the importers in order to show that there were such things known as toy plates, toy teas, etc. The District Attorney, in answer, offered to show that persons calling at the largest toy stores in Philadelphia and asking for earthenware toys were shown only the articles identified as such by the Trenton manufacturers, and informed that larger articles were not toys. The testimony was excluded by the court.

ASSIGNMENT OF ERRORS.

The plaintiff in error respectfully calls the attention of the court to the rulings of the trial judge upon the third and eighth requests to charge:

> Third. If you believe that the articles in question are known as earthenware in the trade, and are chiefly used as other articles of earthenware, stone, and crockeryware are used, and are not chiefly used as playthings for children, then your verdict should be for the defendant.
>
> We can not so charge you. If they were denominated toys by the trade at that time then it is unimportant how they were used. Exception for defendant (p. 118).
>
> Eighth. Upon the evidence in this case the term "toys" should not be given any technical or particular or commercial meaning, but should receive its proper signification and natural import; and if the articles in question are not "toys" in the popular and general sense of the term, but are used for ordinary household purposes, like other articles of earthenware, and if such use is predominating, and not exceptional, then your verdict should be for the fendant.

[This is true, but it is proper to bear in mind that it is predicated on the idea, although not so stated, that you do not find this term "toy" to have a trade signification.] Exception for defendant (pp. 118–119).

Plaintiff also calls the attention of the court to the following rulings upon questions of evidence. During the testimony of William Burges, of the International Pottery, at Trenton, N. J., the following occurred:

Q. You have been to the toy shop of Mr. Schwarz, in Philadelphia, on Chestnut street, above Tenth?

A. Yes, sir.

Q. When were you there?

A. Day before yesterday.

Q. You made inquiry for children's toys in earthenware, did you not?

A. Yes, sir; for toy ware; for toy earthenware.

The DISTRICT ATTORNEY. I propose to ask the witness what was shown him in response to that request.

(Objected to.)

The COURT. For the same reason that I ruled against you before I rule against you now. The acts of this man upon that occasion and under the circumstances do not tend to enlighten this jury on the question of the trade designation of these wares. It only bears upon that one aspect of the case.

(Objection sustained. Exception for the Government.)

The DISTRICT ATTORNEY. I propose to prove by this witness that upon inquiry made by him at the Schwarz toy shop for the production of articles similar to these in importation in this suit the response was given him that they did not keep such articles,

but only dealt in toy tea sets, and offered to produce him tea sets similar to these [small set in box], and he thereupon purchased these.

The COURT. Was Mr. Schwarz a witness here?

Mr. PRITCHARD. No.

(Offer objected to.)

The DISTRICT ATTORNEY. I think that it will be admitted that Mr. Schwarz is probably the largest toy dealer in Philadelphia.

(Objection sustained. Exception for the Government) (pp. 71–72).

On the testimony of James Moses, of the Mercer pottery at Trenton, N. J., the following occurred:

Q. I think that you went to Wanamaker's place, at Thirteenth and Market streets, during last week, or pending this trial, before this case was reached?

A. Yes, sir.

Q. Please state whether or not you saw there a department known as a toy department?

A. Yes, sir.

Q. Did you or not make inquiry in that department for toy earthenware goods?

(Objected to. Objection sustained. Exception for the Government.)

The DISTRICT ATTORNEY. It is proposed to show by this witness that he visited the establishment of John Wanamaker, at Thirteenth and Market streets, and that upon inquiry at the toy department therein was informed that the articles produced here in evidence by the plaintiffs were not sold in that department as toys, but were to be found in the regular china or crockery department of that establishment.

(Objected to by the plaintiff. Objection sustained. Exception for the Government.)

The DISTRICT ATTORNEY. It is also proposed to show by this witness that upon that occasion the goods shown him in the toy department as children's toys were similar to the toy tea sets produced here by the defendant.

(Objected to. Objection sustained. Exception for the Government.)

The DISTRICT ATTORNEY. It is also proposed to show by this witness that thereupon he went to the department in John Wanamaker's establishment known as the crockery or earthenware department, and there was shown the articles produced here in evidence by the plaintiff as samples of this importation.

(Objected to. Objection sustained. Exception for the Government) (p. 85).

TARIFF PROVISIONS.

Prior to 1883, by the Revised Statutes, china and "all other earthen, stone, or crockery ware * * * not otherwise provided for" was assessed at 40 per cent ad valorem; while "toys, wooden and other, for children," were assessed at 50 per cent ad valorem.

By the tariff of 1883 these relative positions were reversed, and "china * * * earthen, stone, and crockery ware * * * painted, printed, or gilded, or otherwise decorated or ornamented in any manner," were assessed at 60 per cent ad valorem; and white china, earthen, and crockery ware at 55 per cent ad valorem; while "dolls and toys" were assessed at 35 per cent ad valorem.

The testimony for defense was substantially that the enactment of this tariff law marked the commencement of

importations of articles such as those in question under the head of toys (p. 71); but the evidence was contradicted, and the fact, so far as material, was settled to the contrary by the verdict of the jury.

The act of 1890 solves the question for the future by inserting in the earthenware clause the words, "including * * * toys."

ARGUMENT.

I.

AS TO REQUESTS TO CHARGE.

By this third request and exception the District Attorney claimed that *a* trade denomination as toys did not govern, if there was also a trade denomination as earthenware for the same articles, and their chief use was not as playthings; making chief use the test, as in the hat-trimmings cases.

By his eighth request and exception he claimed that no sufficient proof was made in this case to override the common English definition of the word "toy," although there might be *a* trade signification to the contrary.

It is respectfully submitted that the alleged commercial designation does not govern the common meaning of the word "toy" in the present case, for two reasons: (1) That the word is used in the statute in its ordinary familiar use as establishing a class of objects of universal knowledge; (2) the alleged commercial usage of the word is not sufficiently universal or sufficiently definite to alter the meaning of the statute.

On the former ground the ruling of Judge Butler is in flat opposition to a ruling made about the same time by Judge Lacombe in *Maddock* v. *Magone* (41 Fed. Rep., 882), a case in which there was evidence as to trade designation as in the case at bar:

> The point submitted to you is a very narrow one. You are simply to answer "yes" or "no" to the question whether these goods are toys. If you make any distinction between the different articles, you will state that distinction when you return your verdict. You have heard the evidence, and all that there is for me to do in leaving the case in your hands is to give you the definition of the word "toy:" "A toy is a plaything; a thing the main use or purpose of which is the amusement of children." Bearing that definition in mind, and instructed by the evidence, you will determine as to these articles whether they are or are not toys. The burden of proof is, of course, upon the plaintiff, as it is in all these cases. He must satisfy you by a fair preponderance of evidence that his side of the case is made out; otherwise the presumption is that the collector, a public officer, rightly decided.

Judge Lacombe's decision, in disregarding commercial usage, is in line with a number of well-known cases, as *Maillard* vs. *Lawrence* (16 How., 251, 261) (wearing apparel); *Greenleaf* v. *Goodrich* (101 U. S., 278) (goods of similar description); *Schmieder* v. *Barney* (113 U. S., 645) (do.); *Newman* v. *Arthur* (109 U. S., 132, 138) (number of threads in cotton cloth); *Barber* v. *Schell* (107 U. S., 617) (manufactures of cotton); *Reimer* v. *Schell* (4 Blatchf., 328) (do.). See also *De Forest* v. *Lawrence* (13 How., 278, 282).

In *Hedden* v. *Richard* (149 U. S., 346, 349), the following comments are made by Mr. Justice Shiras on the doctrine of *Maillard* v. *Lawrence*, and other cases above-cited.

> While a customs law taxing an article which every one in the community might be expected to import, such as "wearing apparel," may use words which everyone understands, and which, unless taken in the ordinary sense, would mislead the whole community, and can not, therefore, be supposed to be intended in any other sense, unless there is something to indicate such intention, yet, on the other hand, a tariff law may use language not intended for the community at large, but for merchants, or for a particular trade, and such as to mislead those for whom it is intended, if not taken in the commercial or trade sense; and such language is that under consideration, speaking of a manufactured article in various stages of its construction. In such a case, as in the other case, the words are to be taken in the sense in which they will be naturally understood by those to whom they are addressed.

In the case tried before Judge Lacombe the second point above referred to does not seem to have been raised. It is, however, well settled that the party claiming a commercial designation has the burden of proof. Presumptively the trade meaning is the colloquial meaning. (*Swan* v. *Arthur*, 103 U. S., 597.)

A commercial designation is one species of commercial usage. There seems to be no assignable reason why its proof should not be governed by the same principle as proof of other trade usages. There is no difference in

this respect between statutes and contracts. To affect the language of either it is necessary that the usage should be general and certain.

Upon the former requirement we may quote the language of Judge Maxwell: "An universal law can not receive different interpretations in different towns. A mere local usage can not be invoked to construe a general enactment, even for the locality." (Endlich on Interpretation of Statutes, § 362.) The requirement of certainty, coming down from the earliest period of our law, has been recognized by this court in the cases, among others, of *United States* v. *Buchanan*, 8 How., 83, 102, and *Oelricks* v. *Ford*, 23 How., 49.

It appears by the testimony that the alleged trade signification is peculiarly local in the sense that it is confined to importers and persons who buy from them, while it is utterly unknown to the American manufacturers and to the persons with whom they deal. To the latter the word "toy" has its colloquial meaning; and, with possibly some minor exceptions, as to which the testimony is not entirely clear, the imported articles fall without.

As to certainty, the importers and jobbers subpœnaed by the plaintiffs failed entirely to give any test by which the custom-house officials could tell what were to be rated as toys in their trade and what not. One said the test was size; another, usefulness; a third, quality; a fourth, decoration. The only thing that they all agreed on was that the material afforded no test at all. One witness, indeed (p. 39), practically abandoned all tests and fell back upon the simple proposition that the articles in question were

toys. To allow such so-called customs to control our tariff laws would put the Government at the mercy of unscrupulous traders. That these articles are called toys upon the English price lists is immaterial. Foreign usages can not be appealed to. (*Elliott* v. *Swartwout*, 10 Pet., 137, 151.) Foreign customs are not recognized by our law; indeed, the vocabulary of trade abroad is not infrequently directed, like the fluctuations of foreign stock markets, toward the accomplishment of pecuniary results on this side of the ocean. American price lists were used by plaintiff below, but there is nothing in the record to show that their contents indicated a different use of trade language from that shown by the testimony of the Trenton manufacturers. Indeed, plaintiff admitted on the stand that the toy-ware mentioned in the Pennsylvania price lists was smaller than the crockery which he imported (p. 12).

By a narrow definition of the word "commercial," the language of this court in the leading cases might be construed to imply that the phrase "commercial designation" applies only to the language of men employed in foreign commerce, and has no application to the language of American manufacturers and purchasers from them. It is believed, however, that the word has no such narrow meaning. Interstate as well as foreign commerce is recognized in our constitution and laws. The question has recently been examined by the circuit court of appeals for the second circuit, and that court has sustained the right of the manufacturer to testify upon the question of trade signification.

We refer to the case of *Erhardt* v. *Ballin* (55 Fed. Rep., 968). In that case the witness in question was a manufacturer, who admitted that he had never bought or sold any imported goods or been present when they were bought or sold, and that his sales, with few exceptions, had been of his own manufacture. The trial judge had thereupon refused to allow him to testify to commercial designation, and it was argued that because "he did not know what name was given to the articles by importers, and was not familiar with the import trade in the article, he was not competent to testify." Judge Wallace, in delivering the opinion of the court, remarked:

> It was said in *Elliott* v. *Swartwout* (10 Pet., 137), that the laws imposing duties on the importations of goods are intended for practical use and application by men engaged in commerce, and hence it had become a settled rule, in the interpretation of statutes of this description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used. The court observed that Congress applied its attention to the description of articles as they derived their appellations in our own markets, "in our domestic as well as our foreign traffic." Since that adjudication it has frequently been said by the courts that the commercial designation of an article "among traders and importers," when clearly established, fixes its character for the purposes of the tariff laws. But we are not aware of any adjudication in which it has ever been declared that the commercial meaning is to be ascertained by a resort solely to the understanding of importers. Tariff laws are addressed, not to importers exclusively, but to the whole com-

mercial community; to the manufacturer, the jobber, the retail merchant, the trader of every description, as well as the importer. The manufacturer, who sells only to the jobber, has a narrower opportunity than the jobber to become generally familiar with the commercial designation of the articles; but so, also, has the importer. The jobber or wholesale merchant who buys of the manufacturer and the importer, and sells to the retailer is engaged in trade with all the more prominent classes of the commercial community. In the case of *Dieckerhoff* v. *Robertson* (44 Fed. Rep., 160) it was said: "In the case of a manufacturer who has a factory and makes goods for himself and puts his own name upon them, and advertises them, his experience is one-sided, because anyone who goes to his factory goes to buy the goods which he himself has made; but a man who is a buyer, and goes to different importers and different manufacturers, and buys from them, necessarily, in the transaction of that business, acquires a knowledge of general trade designation."

The same observations apply measurably to the importer. The witness Hermann, who had dealt with jobbers for twenty-five years, presumably must have known what was the commercial designation among them of the articles he had sold them. It may be reasonably assumed that the name by which they were known among this large class of traders was the name by which they were generally designated by traders in this country. If the witness did not know the commercial designation prevailing among importers, that circumstance only went to the value of his testimony, and to the weight to be given to it by the jury (pp. 969–70).

An independent examination of the authorities in this court confirms Judge Wallace's conclusion. In a few

cases, indeed, "merchants and importers" were referred to as the custodians of the commercial vocabulary. (*Arthur* v. *Morrison*, 96 U. S., 108; *Arthur* v. *Lahey*, 96 U. S., 112; *Arthur* v. *Butterfield*, 125 U. S., 70.) This language was not used, however, with reference to any question of difference between importers and manufacturers, no such question arising in the cases referred to. The doctrine of commercial designation first appeared in our law in the case known as *209 Chests of Tea* (9 Wheat., 430, 438). That was an appeal from a decree sustaining a libel for the forfeiture of imported goods which were scientifically Congo tea, but by usage, according to the weight of evidence, Bohea tea. They were entered under the latter name. Mr Justice Story, delivering the opinion of the court, said that phrases like "Bohea tea" must be used in their "known commercial sense * * * according to the general usage and known denominations of trade * * * as they derived their appellations in our own markets *in our domestic as well as our foreign traffic* * * * derived from the actual business of human life." The goods libeled belonged to a New York importer. Certain witnesses from Boston testified that they were not Bohea teas, but the court reconciled their testimony by inferring that they had in mind the scientific, not the commercial, designation of the goods, and said that a forfeiture should not be enforced against the weight of evidence.

In *Elliott* v. *Swartwout* (10 Pet., 137, 151), Mr. Justice Thompson said:

> Whether a particular article was designated by one name or another in the country of its origin * * * was of no importance in the view of the

> legislature. It applied its attention to the description of articles as they derived their appellations in our own markets *in our domestic as well as our foreign traffic.*

The other cases in this court relating to commercial designations, so far as we have been able to find them, contain nothing to the contrary, but only general language not directed to the questions here raised. (*Barlow* v. *United States*, 7 Pet., 404; *United States* v. *112 Casks of Sugar*, 8 Pet., 277; *Curtis* v. *Martin*, 3 How., 106; *Lawrence* v. *Allen*, 7 How., 785; *Arthur* v. *Cumming*, 91 U. S., 362; *Tyng* v. *Grinnell*, 92 U. S., 467; *Worthington* v. *Abbott*, 124 U. S., 434; *Robertson* v. *Salomon*, 130 U. S., 412; *Seeberger* v. *Cohn*, 137 U. S., 95; *American Net and Twine Company* v. *Worthington*, 141 U. S., 468; *Toplitz* v. *Hedden*, 146 U. S., 252; *Nix* v. *Hedden*, 149 U. S., 304; *Hedden* v. *Richard*, 149 U. S., 346; and other cases above cited.)

II.

EXCLUSION OF TESTIMONY.

The rulings of the trial judge, excluding testimony as to the actual use of the word "toy" in the large retail stores of Philadelphia, seems to have been based either on the position that the usage of retailers is immaterial or on the position that the testimony was hearsay. If the former, then it is respectfully submitted that while the usage of retailers is entitled to less weight than that of jobbers, nevertheless it is of some weight in the solution of the problem.

The rule against hearsay is not fully applicable to questions such as that at bar. Commercial language, like commercial usage and like market value, is provable by expert or opinion testimony, and on matters so provable hearsay is to some extent admitted. In this very case a number of price lists were admitted by the court over defendant's objection. These price lists were simply written offers by various manufacturers or associations of manufacturers to sell certain goods at certain fixed prices. They were just as much hearsay as if the offers had been verbal instead of in writing. These price lists were not indeed put in to show the prices asked. They were put in to show that certain people in the business used certain words with reference to articles like those imported. Why was it not, then, proper for defendant to show in reply that when offers to purchase were made in the same language to the largest retailers in Philadelphia they failed to understand the language as applied to this class of goods? It may be said that the retail dealers, Schwarz and Wanamaker, should themselves have been subpœnaed and asked their opinion on the subject, but would the general question whether they were accustomed to call A B C plates "toys" have been any less hearsay than the question to the witness, himself an expert, whether Schwarz or Wanamaker recognized the toys when an actual offer was made to him?

It is respectfully submitted that while it may well be that a usage must be proved by opinion evidence only and not by multiplying instances, nevertheless the testimony can be met within proper limits by proof of specific

instances. A swears that he is a jobber in earthenware and toys, and that earthenware plates 6 inches wide with pictures on them are known universally and exclusively as toy plates or toys. B swears that he went into the shop of the biggest retailer and asked for toy plates; that the shopman showed him plates 2 inches wide; that he said that was not what he wanted; he wanted plates 6 inches wide; that the shopman said: "Those are not toys. You must go to the general crockery counter." This is substantially what defendant sought to prove. Would not such instances, sufficiently accumulated, be the most conclusive answer to A's contention?

No court has gone further than this court in the admission of hearsay testimony upon commercial questions. We call particular attention to the case of *Cliquot's Champagne*, 3 Wall., 114, very similar in essentials to the case at bar. That was an appeal from a decree of the circuit court of California sustaining a libel against certain imported wines. The case was tried by a jury. The trial turned upon the value of the wines in Paris and Rheims. The Government's main witness was a naval officer, Mr. Farwell, who was not a manufacturer or dealer in champagnes or an expert in their price. He never went to Rheims or to any part of the champagne country. He went to Paris, visited the various agents for champagne wines, and asked them their prices for exportation. They told him their prices and gave him price lists. He was asked on the trial: "What means did you take to ascertain the price or value, and what was the result of your investigation?" He answered: "I

went to the agents of Eugene Cliquot," etc. "I examined the wines there which they had for sale, and inquired the prices per bottle, and also inquired the wholesale prices for shipment to England and elsewhere. The agent stated to me the different prices." This testimony was admitted under objection, as was similar testimony as to conversations with other agents. A vigorous argument was made before this court by Mr. D. B. Eaton, of counsel for the claimant Cliquot. He claimed that the values should have been shown by experienced merchants, and that the prices current admitted by the trial court should have been based on something better than the mere statement of an agent or a wine expert that they represented the prices asked. He ingenuously urged the custom of Frenchmen, presumably including his client, of asking from Americans much higher prices for their goods than they thought they ought to get. The court, however, sustained the rulings at the trial, Mr. Justice Swayne saying:

> I. The defendant's counsel objected to the witness testifying what Jean Petit & Son stated to him—when he visted their place of business, No. 7 Rue de la Mecorcher—in regard to the prices of champagne. The testimony is objected to as inadmissible and incompetent, on the ground that it was hearsay, and that there was no evidence that Petit & Son were the agents of the claimant.
>
> The bill of exceptions does not purport to set out all the evidence given in the case. Whether there was sufficient proof of the agency to warrant the admission of the acts and declarations of the agent in evidence, was a preliminary question for the court to determine. If the proof was insufficient, an ex-

ception should have been taken upon that ground and the evidence upon the subject embodied in the bill. This was not done. It appears, however, that the proof was sufficient. Besides other evidence, the fact was proved by the deposition of Eugene Cliquot, the claimant.

Whatever is done by an agent, in reference to the business in which he is at the time employed, and within the scope of his authority, is said or done by the principal, and may be proved as well in a criminal as in a civil case, in all respects, as if the principal were the actor or the speaker.

II. The second exception was to the admission, in evidence, of the price current furnished by the agent to the witness. Coming from that source, it was clearly admissible. It was not so remote in its bearing upon the issue as to be irrelevant. Its weight and application depended upon the other evidence in the case, which is not shown. We can not presume error. It must be made manifest. The presumption is the other way.

III. The witness further testified, that almost all the leading champagne manufacturers have agencies in Paris; that he inquired of several agencies for champagne at wholesale for exportation, and the agents uniformly stated to him their prices; that he could find no agents for Eugene Cliquot at Paris, other than the house of Petit & Son. That among other wine-dealers in Paris was the house No. 6 Provence Street, on the outside of which was a sign "Delenge Ragot, of the firm of Minet, Jr., & Co., Rheims." That he called at this establishment, and was shown by the proprietor samples of various wines, who stated their wholesale prices: that he was also at the same time handed a printed price current, which he produced on the trial.

The claimant's counsel objected to the reading of the price current in evidence, on the ground that it would be hearsay, irrelevant, etc.; that it gave the prices but by single bottle; that no actual transaction was based on it; that the paper was no way connected with Cliquot; and that the wines did not appear to be the same in quality with those libeled.

Was the objection well founded?

In *Lush* v. *Druse*, the proof upon the trial, in the court below, was as follows: "A witness proved the value of wheat in Albany, in 1822, 1823, 1824, and 1825, derived by him from the books of large dealers in wheat, at that place, he knowing nothing of the price of his own knowledge." The court said: "The proof was by a witness who had inquired of merchants dealing in the article and examined their books. This, uncontradicted, was sufficient." With this ruling we are satisfied. While courts, in the administration of the law of evidence, should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not incumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy—itself a serious evil—without giving any additional safeguard to the interests of justice. We think the price current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness, both of which were admissible upon the authority of the case referred to in Wendell. It was clearly relevant. What effect it should have, in connection with the other evidence adduced by the parties, was a question for the jury (pp. 139–141).

In *Fennerstein's Champagne*, 3 Wall., 145, argued and decided at the same time, letters from agents stating offers to sell were admitted in evidence, because made in the ordinary course of business. These cases are sustained in *Chaffee* v. *United States* (18 Wall., 516, 542), on the ground that the hearsay evidence related to a matter of opinion, namely, market value. Mr. Croswell, in his note to 2 Greenleaf on Evidence, 15th ed., § 261, cites the Cliquot case in support of the following proposition: "What the market price is may be proved by price lists stating what price the manufacturer will sell for, or the statements of dealers in answer to inquiries, or by offers to sell as well as by actual sales." The admissibility of offers to sell upon questions of market value is a matter about which the State courts are in conflict. (*Whitney* v. *Thacher*, 117 Mass., 523; *Hine* v. *Manhattan Railway Company*, 132 N. Y., 477.)

Doctrines allowing hearsay evidence upon questions of market value apply much more strongly to questions of commercial designation. In the latter case the hearsay is not secondary evidence at all, but strictly primary in nature. The very fact to be proved is the phraseology adopted by the person whose words are reported. The fact sought is not what his articles were worth, or what he said they were worth, but what name he gave to them when he said it.

It is respectfully submitted that the judgment should be reversed and a new trial ordered.

EDWARD B. WHITNEY,
Assistant Attorney-General.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

RECORD CASE No. 14,036.

IN THE

Supreme Court of the United States.

No. 106. October Term, 1893.

John Cadwalader, Collector of Customs for the District of Philadelphia, Plaintiff in Error,

vs.

John E. F. Zeh, Frederick Ebeling, and Theodore Reuss, trading as Zeh, Ebeling & Reuss, Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANTS IN ERROR.

FRANK P. PRICHARD,
For Defendants in Error.

Allen, Lane & Scott, Prs., Phila.

In the Supreme Court of the United States.

John Cadwalader, Collector, &c., Plaintiff in Error and Defendant below,

vs.

John E. F. Zeh et al., *trading as Zeh, Ebeling & Reuss, Defendants in Error and Plaintiffs below.*

October Term, 1893.

No. 106.

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR DEFENDANTS IN ERROR.

The importation in the present case was composed of toy plates, toy mugs and toy teacups and saucers. The importers (plaintiffs below) claimed that these articles were dutiable under the following paragraph of Schedule N, Act March 3d, 1883, viz.:—

Dolls and toys, thirty-five per centum *ad valorem*.

The collector (defendant below) imposed duty on them under the following paragraph of Schedule B of the same Act, viz.:—

China, porcelain, parian and bisque, earthen, stone and crockery ware, including plaques, ornaments, charms, vases and statuettes, painted, printed or gilded, or otherwise decorated or ornamented in any manner, sixty per centum *ad valorem*.

On the trial the witnesses on both sides agreed that the word "toys" was a trade term, designating a commercial class

of articles, and that in the trade certain articles made of earthenware were specifically known and dealt in, both by the manufacturers and dealers, as toys. There was a difference of opinion between the witnesses for plaintiff and the witnesses for defendant as to whether all the articles in suit were within the trade designation, and this question of fact was submitted to the jury; but as to the existence of the designation as a trade term there was no dispute. This is clearly shown by the following portion of the judge's charge, which was not the subject of exception (Record, page 119, folio 287):—

The signification of the term in common speech embraces only such things as are primarily intended for the entertainment and amusement of children. It does not matter that they may be susceptible of other uses, if the predominating design and use is such amusement and entertainment the articles fall within the signification of the term "toys," as employed in ordinary speech. If the predominating use is not to amuse, although the articles may be suitable for, and be applied to, this purpose, they are not toys within the common signification, as before stated; that is, within the meaning of the term as employed in common speech. If, therefore, you do not find from the evidence that the term "toy" has a different trade signification as before explained, the criterion just indicated will guide you in determining whether the articles here involved are "toys." If, however, you find that it has such different trade signification, then the statute must be understood as using the term in this sense, and its ordinary signification in common speech before explained will cease to be of any importance in disposing of this case. That it has a well understood trade signification, the evidence seems to put beyond doubt. The witnesses on both sides testify that the term "toy" (at the date of the statute and for many years before) was in common use among those engaged in this branch of commerce. They (the witnesses) differ only as respects the scope of its application. The question of fact for your consideration, therefore, seems to be narrowed to the inquiry: What is the scope of the term as thus used, or rather, what was its scope at the date of the statute? In other words, what was then embraced within the signification of the term "toys" as employed by merchants engaged in this branch of commerce? Did it include the articles here involved? The plaintiffs' witnesses, merchants engaged in this trade, testify that it did embrace them. These witnesses are numerous, and have had large experience in the trade. If you believe them, if their statements are reliable, they settle the question; and the articles must, therefore, be classified as "toys," and a verdict rendered for the plaintiff in the amount of the claim. On the other hand, a number of witnesses were called by the defendant who testified that the term as used in the trade did not at the time referred to, and does not now,

embrace these articles. That its scope was and is narrower, as they describe. Whether their experience and intelligence respecting the question are as great as that of the plaintiffs' witnesses, and whether their testimony is as reliable and valuable, you must judge. The plaintiff has also placed before you numerous trade circulars or price lists containing information on the subject. From this evidence and any other you may find in the cause bearing on the subject, you must decide whether the term "toy" as used in the trade at the date of the statute did or did not embrace these articles. If you find it did, your verdict will be for the plaintiff as before stated. If you do not so find, your verdict will be for the defendant."

The question at the trial thus narrowed itself down to one of fact, viz., whether the imported articles were within the trade designation of toys, and this question was decided in favor of the plaintiff below.

At the time of writing this brief neither brief nor assignments of error have been filed by the plaintiff in error. The exceptions taken to the charge, however, seem to raise substantially two questions :—

First.—Was the court below right in instructing the jury that when the term "toys" had a commercial designation, that designation governed in determining the rate of duty ;

Second.—Was the court below right in instructing the jury that if the imported articles were within the commercial designation of toys, they were liable to the duty on "toys," notwithstanding that they were composed of earthenware material.

Before discussing these questions it is proper to call the attention of the court to the fact that these same questions have once before been brought to this court, although not then argued. In 1885 a suit brought by the same plaintiffs or their predecessors in business was tried in the Circuit Court for the Eastern District of Pennsylvania, and resulted in a verdict in their favor. The Government took a writ of error, and an examination of the record (No. 270, October Term, 1887) will show that it raised substantially the same

questions as the present case. When the case was reached the Government abandoned the contest, and on motion of the Solicitor General the case was dismissed. The Treasury Department at first acquiesced, but subsequently directed that another suit should be contested, and the present case was tried, resulting in similar rulings as to the law and a similar verdict as to the facts. The Government then took this writ of error.

As to the Commercial Designation.

The charge of the court upon the question of commercial designation was in exact accordance with the decisions of this court. All the witnesses on both sides testified that the word "toys" was a trade term designating a particular commercial class of articles. This was corroborated by trade price-lists and circulars. The court below charged that if the jury found that there was a commercial designation, that designation must govern. To have done otherwise would have been to disregard the opinions of this court. In

Robertson *vs.* Salomon, 130 U. S., 412,

this court, speaking by Mr. Justice Bradley, said:—

> The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. See Arthur *vs.* Lahey, 96 U. S., 112–118; Barber *vs.* Schell, 107 U. S., 617–623; Worthington *vs.* Abbott, 124 U. S., 434–436; Arthur's Executors *vs.* Butterfield, 125 U. S., 70–75. But if the commercial designation fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation.

And in the recent case of

Hedden *vs.* Richard, 149 U. S., 346,

this court, speaking by Mr. Justice Shiras, said:—

> With regard to the language of commerce, the general rule laid down by this court is that it must be construed, when used in laws imposing duties on importations of goods, and particularly when employed in the denomination of articles, according to the commercial understanding of the terms used. United States *vs.* One hundred and twelve casks of sugar, 8 Pet., 277; Elliott *vs.* Swartwout, 10 Pet., 137. While it is true that "language will be presumed to have the same meaning in commerce that it has in ordinary use unless the contrary is shown," Swan *vs.* Arthur, 103 U. S., 597, 598, yet "the commercial designation of an

"article among traders and importers, where such designation is clearly "established, fixes its character for the purpose of the tariff laws. * * * "A specific designation *eo nomine* must prevail over general terms, and "a commercial designation is the standard by which the dutiable charac- "ter of the article is fixed." Arthur *vs.* Lahey, 96 U. S., 112, 113, 114. This rule is equally applicable where a term is confined in its meaning not merely to commerce but to a particular trade, and in such case also the presumption is that the term was used in its trade signification.

Further argument on this point would seem to be unnecessary.

As to the Rate of Duty.

It is apparent that the word "toys" must be considered as a word of special description limiting the operation of all the general clauses of the Tariff Act. Almost every article of use is reproduced in miniature as a toy, and nearly every kind of material known to the tariff is used in the manufacture of such toys. Toy-houses, toy furniture, toy household and kitchen utensils, toy tableware, toy clothing, toy vehicles, toy boats, toy musical instruments, toy watches, toy cutlery, toy jewelry, &c., are largely manufactured and form no inconsiderable portion of our imports. To class these under the general heads to which the useful articles which they imitate belong, or to class them according to the materials of which they are composed, would be to nullify the toy clause of the Tariff Act. To give any practical effect to that clause it must be considered as establishing a specific subordinate class excepted out of the general clauses of the Act, and to be equivalent to the insertion after each general clause of the words "but if "the article is a toy, there shall be levied upon it a duty of "thirty-five per cent." This is the method of interpretation adopted in Salomon *vs.* Arthur, 102 U. S., 208, and is frequently necessary to harmonize and reconcile what is sometimes an apparent conflict of language without a real conflict of meaning. Congress, by placing one rate of duty upon all toys, has shown a clear intention to disregard both the form of the toy and the kind of material of which it is composed. It may be woodenware or earthenware or furniture or clothing. It may be wool or silk or iron. It may be

included in the general class name of the useful article which it imitates, but if it is a toy and belongs to that separate commercial class of articles whose general function it is to minister to the amusement of children, and which has always formed a distinct and important department of trade, it comes within the special designation of toys and pays duty as such.

This ruling is in entire accord with the decisions of this court, which has uniformly held that where a specific duty has been imposed upon an article or a subordinate class, the duty imposed upon the general class is not applicable.

In the case of

Salomon *vs.* Arthur, 102 U. S., 208,

already referred to, a general clause imposed a duty on "manufactures composed of mixed materials, in part of "cotton, silk, wool or worsted, hemp, jute or flax." Another clause or Act imposed a different duty on manufactures of which silk was the component material of chief value. The court (Mr. Justice Bradley delivering the opinion) said:—

It is observable that the description of "manufactures made of mixed "materials, in part of cotton, silk," &c., is more general than that of "manufactures of which silk is the component part of chief value." Logically, the two phrases standing together in the same Act or system of laws would be related as follows: "Goods made of mixed materials, "cotton, silk, &c., shall pay a duty of thirty-five per cent., but if silk is "the component part of chief value they shall pay a duty of fifty per "cent."

This was followed and approved in

Hartranft *vs.* Meyer, 135 U. S., 237.

In the case of

American Net and Twine Co. *vs.* Worthington, 141 U. S., 468,

the article fell within the general designation of "linen "thread," which was subject to one rate of duty, and was also within the special commercial designation of "gilling twine," which was subject to a different rate of duty. This court (Mr. Justice Brown delivering the opinion) said:—

While in the absence of a more specific designation this article might properly be classed as linen thread, it is a familiar rule in revenue cases that where Congress has designated an article by a specific name and imposed a duty upon it, general terms in the same Act, though sufficiently broad to comprehend such article, are not applicable to it; in other words, the article will be classified by its specific designation, rather than under a general description. Homer *vs.* The Collector, 1 Wall., 486; Arthur *vs.* Lahey, 96 U. S., 112; Arthur *vs.* Stephani, 96 U. S. 125; Movius *vs.* Arthur, 95 U. S., 144.

We think the intention of Congress that these goods should be classified as "gilling twine" is plain; but were the question one of doubt we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language. United States *vs.* Isham, 17 Wall., 496; Hartranft *vs.* Wiegmann, 121 U. S., 609; Gurr *vs.* Scudds, 11 Exch., 190.

The fact that the more specific clause relates, not to a single article, but to a specific class of articles, the members of which are embraced within many general clauses of the Tariff Act, does not alter this construction. Thus in

Arthur *vs.* Zimmerman, 96 U. S., 124,

a general clause imposed a duty on "cotton braids." Another clause imposed a duty on "trimmings" for "making or ornamenting hats," and it was held that "hat braids" made of cotton were dutiable under the latter clause; and in the subsequent hat trimming cases—

Hartranft *vs.* Langfeld, 123 U. S., 128;
Robertson *vs.* Edelhof, 132 U. S., 614;
Cadwalader *vs.* Wanamaker, 149 U. S., 532—

it was settled that hat trimmings, although composed of many different materials, and included within various general clauses of the Tariff Act, constituted a specific class, and articles coming commercially within that class were subject to the specific duty thereon, notwithstanding that they were also embraced within other general clauses.

Any other construction of the Tariff Act would lead to hopeless confusion, since the Act is full of provisions for just such classes as "toys." Take, for example, the class of "Philosophical apparatus and instruments," or the class of "Smokers' articles," or the class of "Books, household

"effects or libraries or parts of libraries in use of persons or "families from foreign countries," &c. All these are examples of classes which are made up of individual members falling within the language of many general clauses of the Tariff Act, yet it would be absurd to say that they related only to such articles as could not be classed within such general clauses.

The ruling of the court below is not only theoretically the proper interpretation of the Act, but it has been the practical interpretation of the customs officers both before and since the passage of the Act of 1883.

In 1870 a question arose as to certain fans, furs, jewelry, combs, brushes, &c., in miniature, imported into New York. The duty at that time on toys was fifty per cent., and the collector imposed that duty. The importer appealed, but the Secretary of the Treasury sustained the decision of the collector.

Synopsis of Treasury Decisions, 569.

The same ruling was made on small earthenware tea sets, which were classified as toys, both before the Act of 1883, when the duty on toys was higher than the duty on earthenware, and after the Act of 1883, when the duty on toys was lower than the duty on earthenware.

Synopsis of Treasury Decisions, 3485, 8003, 8012 and 8170.

In Synopsis No. 3485, above referred to, the Department said:—

The portion of the consignment which consists of small tea sets intended as playthings for children, having no value for practical use, was, in the opinion of the Department, properly classified as "toys" without regard to the material of composition.

In Synopsis 8003 *supra* the Department said:—

The samples submitted, which consists of a small cup and saucer of cheap earthenware with gilded lines and the gilt inscription, "Be

Happy," on the cup, are evidently not intended for use otherwise than as toys for the amusement of children; and the appraiser at New York to whom the samples have been submitted reports that such articles are commercially known as "toys" and are so classified at that port."

In Synopsis of Treasury Decisions No. 2107, small pianos were classed as toys, although there was a provision in the tariff for "musical instruments of all kinds."

In Synopsis of Treasury Decisions 11,839 the question as to the classification of small harmonicas came before the board of general appraisers, who said:—

The merchandise covered by protests 11,243a, 10,787a and 10,788a consists of harmonicas. An examination of the samples thereof shows that they contain from ten to twelve keys, and that they are valued at from three and forty-one one-hundredths to fifty-nine one-hundredths marks per dozen. In G. A. 480 notice was taken of the difficulty of determining just what kinds of harmonicas are chiefly designed and used for the amusement of children, and in that decision we held that defective harmonicas, and those costing less than one and forty-one one-hundredths marks per dozen were so designed and used. In the present case the question was more fully investigated, and we find from the evidence that all the harmonicas covered by these protests are chiefly sold and used for the amusement of children; that they are bought, kept in stock, listed, sold and commercially known as toys, and that they are dutiable at thirty-five per cent. *ad valorem*, under paragraph 436 of the present Tariff Act, as claimed by the appellants, and we sustain their claim as to these goods.

The same question came before the board upon an importation of tin-plates, and the board said (Synopsis of Treasury Decisions 11,989):—

An examination of the sample plate accompanying the papers in the case seems to support the contention of the importers. It is quite likely that in exceptional cases tin-plates similar to these in question serve a substantial use. We can entertain no doubt, however, and find as facts, that they were primarily intended for and are chiefly used by children as playthings, and we hold that the plates covered by the protest in the present case are toys and are dutiable at thirty-five per cent. *ad valorem*, under paragraph 436, N. T., as claimed by the appellants. The protest is accordingly sustained.

And in Synopsis of Treasury Decisions 13,223, upon an importation of certain celluloid balls, which were claimed by

the collector to be dutiable under paragraph 21, "all com- "pounds of pyroxylene, by whatever name known," and by the importer to be dutiable as "toys," the board said:—

> The board has repeatedly held, and the courts so ruled, that merchandise belonging to a class of goods, which class of goods is provided for in the tariff by the name commercial men have given it, such as cutlery, wearing apparel, hat trimmings, smokers' articles, firearms and toys, is more specifically provided for in the paragraph enumerating such class of goods than in the paragraph covering the material composing the merchandise.
>
> In the present case we hold the articles are more specifically provided for as toys than elsewhere in the Act.

The foregoing decisions of Treasury officials are cited, not because of any supposed weight as authority, but because they illustrate by the practice of the Department the argument heretofore made that the construction put upon the Act in this case by the court below is the only practical construction possible.

In addition to the exceptions to the charge, there are several exceptions to rulings of the court below upon offers of evidence. Until the Government's brief is received it is impossible to know whether these exceptions will be pressed, and hence any extended discussion of them is postponed until the receipt of that brief. One of them relates to the admission of certain printed trade price lists or catalogues, the others relate to the refusal of the court to allow evidence of answers made at various stores by persons not witnesses to questions put by Government officers.

With regard to the catalogues or price lists the exception was as follows:—

> I except to the evidence, because there is no evidence that the book is published by the Brown Hill Pottery Company.

It subsequently appeared by the testimony of the same witness that he personally received the paper from the Brown Hill Pottery Company at their pottery. (Record, page 11, folio 25.) This removed the only ground of objection, and at the close of the plaintiff's case the catalogues were again

offered in evidence, and the objection was not renewed (Record, page 49, folio 115.)

These catalogues were clearly evidence. In fact no better evidence of the existence and meaning of trade terms could be offered than printed catalogues proves, as these were to have been circulated by large manufacturers throughout the trade.

See the case of

Cliquots Champagne, 3 Wall., 114,

and as the only objection to them was removed by the subsequent testimony this question drops out of the case.

With regard to the other exceptions to rulings on evidence, it is hardly to be supposed that they will be seriously pressed. The offers were to show what was said by persons not witnesses in answer to inquiries made by witnesses at certain stores. It is submitted that such testimony was clearly inadmissible.

FRANK P. PRICHARD,
Attorney for Defendants in Error.

REPLY TO BRIEF OF PLAINTIFF IN ERROR.

Since the foregoing brief was written the brief on behalf of plaintiff in error has been received, and it has now become possible to answer specifically the argument made therein.

Before doing so it is proper to call attention to the fact that, both in his statement of the case and in his argument, the learned counsel for plaintiff in error has inadvertently fallen into error with regard to the character of the evidence. He assumes that the articles in suit were larger than those made in this country under the name of toys, and that the evidence as to commercial classification was vague. This, however, is a mistake. With regard to size, it appears on page 111 (folio 263) that one of defendant's witnesses, a Trenton manufacturer, being shown one of his cups, quoted separately on his printed catalogue as a toy, was asked to pour

water into it from one of the cups in suit, and did perform that experiment in the presence of the jury, with the result that the two cups were found identical in size. With regard to the commercial classification, not only did the plaintiff produce both foreign and domestic printed trade catalogues, containing toy plates, toy cans, toy teas, &c., but the defendant's witnesses produced their own catalogues, all of which contained a separate classification of toy ware, not confined to toy tea sets or to articles of smaller size than the articles in suit. Almost every witness on both sides admitted that there was a separate commercial class of earthenware articles known as toy ware and bought and sold under that name. As is usual in such cases, the witnesses being more accustomed to practical discrimination than scientific definition, were often puzzled to define the attributes which enabled them to distinguish the articles intended for toys, but there was no difficulty with any of them in practically selecting such articles. The counsel for plaintiff in error has ingeniously selected out of over one hundred printed pages of testimony a few extracts for the purpose of showing that the witnesses could not tell whether it was size or decoration or quality which distinguished the toys, the fact being, as was shown by the evidence, that no one of these attributes necessarily settled the question, but even the extracts quoted do not show that there was any difficulty among the merchants in actually distinguishing the toys from other articles. The real fact was stated in the answer of Mr. Frymier quoted in the brief for plaintiff in error, on page 6, viz.:—

> Q. Is it size alone that determines the question as to whether the thing is known in the trade as a toy?
>
> A. No, sir; there is a certain line of goods in the trade that are known as toys, and known as such, and bought and sold as such. Those goods you show here come under that head in the trade.

In fact there was no real dispute as to the existence of a trade classification. The court so stated in its charge, and this was amply borne out by the evidence and was not excepted to. The only question for the jury was whether the

articles in suit were recognized in the trade as being within the class, and this question was determined in favor of plaintiff.

The argument for plaintiff in error is based upon two propositions :—

1. That the question submitted to the jury should have been not what the imported articles were called in the trade at the date of the statute, but what they were called in popular language, this latter being dependent upon the opinion of the jury as to their chief use.

2. That the testimony of a witness as to information given to him by an employé at a particular store, as to the practice of that store in the sale of goods, was competent evidence on the subject of trade designation, and should have been admitted as such.

These propositions will be considered separately.

As to the Commercial Designation.

The court below, in affirming defendant's first, second, fifth, sixth, and seventh points, expressly charged the jury that if the imported goods were bought and sold, or commercially designated as earthenware and not as toys, the plaintiff could not recover, and further, that if there was no trade designation the question was one simply of predominant use. (Record, pages 117–118, folio 282–286.) The plaintiff in error now contends that the existence of a trade designation should have been ignored by the court, because, to quote the exact language of plaintiff in error's brief, (1) "the word is used in "the statute in its ordinary familiar use as establishing a class "of objects of universal knowledge, (2) the alleged commer- "cial usage of the word is not sufficiently universal or suffi- "ciently definite to alter the meaning of the statute."

As to the first reason, it is sufficient to say that Congress is supposed to use a word in its commercial sense if it has one. There are, of course, words, such as "wearing apparel," which

are not trade terms. There is no special branch of trade devoted to wearing apparel. No articles are bought and sold under that name. There are no wearing apparel stores or wearing apparel merchants. It is the name of a class that includes goods in many different branches of trade, and is used only in connection with the individual consumer or importer. But the word "toys" is not only a popular term, it is also a trade term. There are toy merchants, toy manufacturers, toy importers. The toy trade under that name is a large and important branch of commerce. Toys are imported by that name not principally by individual consumers, but by merchants as a branch of trade, and it was for the guidance of such merchants in the course of trade that the word was employed in the Tariff Act. It was admitted by the witnesses on both sides that the word was a trade term, and that there was a class of articles made of earthenware which were bought and sold and imported under that name prior to the passage of the statute. To have disregarded this, and to have told the jury that the importer should pay a duty not according to the trade classification, but according to the jury's opinion as to use, would have been to disregard the previous opinions of this court already quoted in this brief. The effect would also be to produce great uncertainty in the enforcement of the law. Trade classifications, especially if of many years standing, are reasonably certain, and can usually be readily proved by printed catalogues, &c. Such classification is usually founded upon the primary use, and is the best possible evidence of such use. If, however, each jury is to be allowed to disregard the actual trade classification and exercise its own judgment as to what such classification ought to have been according to its opinion as to probable use, then no merchant is safe in importing goods, however well settled may be the trade designation. Nor will the question ever be settled, since the question of probable use is one on which different juries may readily differ in opinion.

It is not necessary to make further argument on this point in view of the authorities already cited in the main portion of

this brief. The whole doctrine is clearly and tersely stated by Mr. Justice Brown in—

American Net, &c., Co. *vs.* Worthington, 141 U. S., 468, 471,

as follows:—

> It is a cardinal rule of this court that in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense and that their denomination in the market when the law was passed will control their classification without regard to their scientific designation, the material of which they may be made or the use to which they may be applied.

As to the contention in the brief of plaintiff in error that the evidence of trade designation was local and uncertain, it is sufficient to point out that it was not confined to any locality, but, on the contrary, it was supported not only by trade catalogues published in England, but by trade catalogues published in various parts of the United States, and as to its certainty the witnesses on both sides testified that there was a trade designation of particular articles of commerce made of earthenware as toys, and the plaintiff's witnesses, including earthenware dealers, earthenware importers, toy dealers and toy importers, all testified that the articles in suit were within that class and were bought and sold under that name.

As to the Rejection of the Offers of Evidence.

Plaintiff in error complains of the rejection of two offers of testimony found on pages 8 and 9 of his brief.

The first offer was to prove by a witness that he went to the store of a toy dealer in Philadelphia and asked for articles similar to those in suit and was told (by whom did not appear, but presumably by an employé) that they did not keep such articles, but only dealt in toy tea sets. (Page 8, plaintiff in error's brief.)

The second offer was to prove by another witness that he went to John Wanamaker's store and was there informed (by whom did not appear) that the articles in suit were not sold in the toy department, but were sold in the crockery department; that he was shown in the toy department certain small

toy tea sets and was shown in the crockery department articles identical with those in suit.

In neither case was the witness called as an expert. There was no attempt to show trade designation by a witness who had gone to a sufficient number of establishments to have acquired knowledge of trade designation on which he could base a reliable opinion. On the contrary in each case the witness was called to prove by hearsay an isolated fact and that a fact not material. It was not material to the issue to show that Mr. Schwarz, who was not a witness, did not keep the articles in suit and did keep certain other articles, nor was it material to the issue to show by another witness that John Wanamaker sold such articles in his crockery department and not in his toy department. In neither case was the question one of trade designation, since the articles might well have been bought and sold and designated in the trade as toys, and yet not have been kept in stock by Mr. Schwarz and have been sold in the crockery department by Mr. Wanamaker. Nor in any event could two isolated instances have been given in evidence to prove or disprove a trade usage. Suppose, however, that the facts had been material. Mr. Schwarz's store was within a stone's throw of the court-room. Mr. Wanamaker's store was a few blocks away. The proper way to have proved the facts, if they were material, was to have called some one who had knowledge, not some one who had merely been informed by an employé. The latter would be clearly hearsay evidence and inadmissible.

The cases cited in plaintiff in error's brief do not support his contention.

Trade catalogues are admitted, because, being published in the ordinary course of business and being addressed to and intended for the trade at large, there is a presumption that the language and prices are the language and prices of the trade. On the same ground, public offers made in public exchanges and reported, are evidence of market value because of their publicity, and because addressed to the trade at large. There is no such conflict on this point in the State courts as is stated on page 25 of plaintiff in error's brief. On the contrary the two cases he cites are in harmony.

Oral replies of dealers to inquiries stand on a different footing. The reply of a single dealer to an inquiry by a witness, is, of course, not evidence. If, however, a witness has qualified himself as an expert by inquiries among a sufficient number of persons under circumstances which show that he has fairly acquainted himself with the usage of the trade, he may give his own opinion as evidence and may state as the grounds of his opinion the inquiries he has made and the answers he has received. In the case of

Chaffee *vs.* U. S., 18 Wall., 516–542,

Mr. Justice Field, referring to this kind of testimony, said:—

> A party without having been previously engaged in any mercantile transaction may be able to give, with great accuracy, the market value of an article, the dealing in which he has watched; and in stating the grounds of his opinion, he may very properly refer to all these circumstances and even the verbal declarations of dealers.

This is the true ground and the only ground upon which to admit such evidence. This, however, does not justify the proposition that a witness not called to testify as an expert on the general trade usage, can testify as to what an employé in a store told him as to the particular practice of the proprietor, or even as to what he, himself, observed in the store in reference to that practice; nor does it justify the proposition that such individual practice can be given in evidence to prove a trade usage.

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